

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6064

Signed

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANK and ANA SILVERMAN,

Petitioners-Appellants

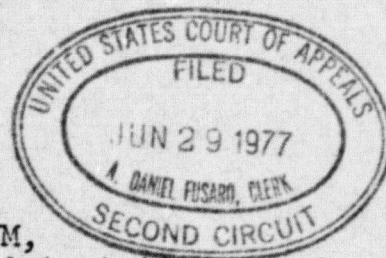
v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



MYRON C. BAUM,
Acting Assistant Attorney General,

GILBERT E. ANDREWS,
WILLIAM A. FRIEDLANDER,
WYNETTE J. HEWETT,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

DAVID G. TRAGER,
United States Attorney.

RODGER C. FIELD,
Assistant United States Attorney.

TABLE OF CONTENTS

	Page
Statement of the issue presented -----	1
Statement of the case -- -----	2
Summary of argument -----	5
Argument:	
The District Court correctly held that sums deposited in taxpayers' bank accounts were not, by the provisions of Section 407 of the Social Security Act, exempted from levy to satisfy their federal tax liabilities -----	5
Conclusion -----	9
Appendix -----	11

CITATIONS

Cases:

<u>Fried v. New York Life Insurance Co.</u> , 241 F. 2d 504 (C.A. 2, 1957), cert. denied, 354 U.S. 922 (1957) -----	7
<u>Kane v. Burlington Savings Bank</u> , 320 F. 2d 545 (C.A. 2, 1963), cert. denied, 375 U.S. 912 (1963) -----	7, 8, 9
<u>Philpott v. Essex County Welfare Board</u> , 409 U.S. 413 (1973) -----	7, 8
<u>Silverman v. Commissioner</u> (T.C. Docket Nos. 3506-68, 9003-72, 9004-72, decided July 12, 1976), aff'd, 39 A.F.T.R. 2d 997 (C.A. 2, Feb. 10, 1977), cert. denied, 45 U.S. Law Week 3778 (Sup. Ct., May 31, 1977) -----	4
<u>Sims v. United States</u> , 359 U.S. 108 (1959) -----	6, 8
<u>United States v. Mitchell</u> , 403 U.S. 190 (1971) -----	6, 8

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.), Sec. 6334 -----	6, 11
Social Security Act, c. 531, 49 Stat. 620, Sec. 207 (42 U.S.C. § 407) -----	6, 13

Miscellaneous:

H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A408-A409 (3 U.S.C. Cong. & Adm. News 4017, 4556) -----	6
9 <u>Mertens Law of Federal Income Taxation</u> (Rev.) §49.192 -----	6
S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 577-578 (3 U.S.C. Cong. & Adm. News 4621, 5226-5227) -----	7

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STATEMENT OF THE ISSUE PRESENTED

Whether Section 407 of the Social Security Act (42 U.S.C.)
exempts sums deposited in taxpayers' bank accounts from a levy
to satisfy federal tax liabilities.

STATEMENT OF THE CASE

Taxpayers, Frank and Anna Silverman, instituted this suit on March 28, 1977, for the purpose of having the Government's levy on certain bank accounts to satisfy their tax liabilities vacated. (Docket Entries; R. 4, 7.)^{1/} On April 1, 1977, following a hearing, the United States District Court for the Eastern District of New York (Judge Platt) dismissed the suit. (Docket Entries; R. 28.) The order of dismissal was entered on April 5, 1977, and taxpayers filed their notice of appeal on April 7, 1977. (Docket Entries; R. 29.) Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291.

The relevant facts may be summarized as follows:

On March 16, 1977, the Internal Revenue Service served a notice of levy to the Roosevelt Savings Bank seeking to satisfy certain unpaid tax liabilities from sums in taxpayers' accounts. (R. 4, 11.) On the date of the levy, the two savings accounts and the checking account contained \$496.67. (R. 4.) The bank by letter advised the taxpayers that it had received the notice of levy, that it had stopped payment of items from the accounts, and that it would forward to the Internal Revenue Service drafts for the balances in the savings accounts and a check for the balance in the checking account when the taxpayers executed them and returned them to the bank. (R. 11.) Following receipt of the letter, taxpayers instituted this action to vacate

^{1/} "R." references are to the separately bound record appendix. Documents cited are the documents comprising the original record on appeal.

the levy on their accounts. (R. 11.)

Taxpayers alleged below that the sums contained in the accounts represented the proceeds of social security benefit payments.^{2/} (R. 4. Specifically taxpayers alleged that Anna Silverman made a deposit of \$92.10 into the accounts on January 13, 1977, and another on February 14, 1977, and that these sums represented the amount of social security benefit payments to her for those months. (R. 8-10, 12.) In support of the allegations taxpayers submitted the affidavit of Anna Silverman to the effect that she had deposited social security benefit payments in the accounts during January and February and that on March 15, 1977, she had transferred from the savings accounts to the checking account \$100 which also represented the proceeds of social security benefit payments. (R. 9.) Taxpayers submitted with their pleading deposit slips relating to these amounts. (R. 12.) Taxpayers further alleged that their tax liabilities were the subject of litigation and

2/ It is not clear whether taxpayers intended to allege that social security benefit payments were received by both of them or just Anna Silverman. (R. 4, 16; Tr. 5-6 cf. R. 5, 8-9, 13; Tr. 4, 8.) In any event, the only specific allegations of the complaint concerned Anna Silverman's receipt of benefit payments for January and February. (R. 5.)

In this connection taxpayers state (Br. 5-6) that the Government conceded in the court below that the sums in the accounts represented the proceeds of social security payments. Government counsel argued (Tr. 10-11; R. 27), however, that taxpayers had failed to establish that the accounts contained the proceeds of social security benefit payments, and that the only specific allegations of the complaint concerned the January and February checks. Taxpayers did not present testimony or other evidence at the hearing to establish the allegations of the complaint, but rather relied on the affidavit attached to their pleading and upon their memorandum of law. (Tr. 8-9.) Apparently taxpayers' check register was presented to the court but it is not clear whether it was accepted in evidence or what allegations of the complaint it was intended to support. (See, Tr. 11.)

that their petition for a writ of certiorari was then pending.^{3/}
(R. 5, 13.)

Taxpayers argued below (Tr. 4-5, 8; R. 16-19) that the sums in the accounts were exempt from levy under Section 407 of the Social Security Act (42 U.S.C.) because they represented the proceeds of social security benefit payments. After the arguments of counsel were presented at the hearing, the District Court dismissed taxpayers' suit on the ground that the exemption contained in the Social Security Act is not effective against a levy to satisfy federal tax liabilities. (Tr. 11-12; R. 28.)

^{3/} Taxpayers filed petitions in the Tax Court contesting deficiencies for the taxable years 1960 through 1965. On July 12, 1976, the Tax Court entered decisions based upon stipulated income tax liabilities in the amount of \$66,723.78 and fraud penalties in the amount of \$33,361.90. Silverman v. Commissioner (T.C. Docket Nos. 3506-68, 9003-72, 9004-72). This Court affirmed the decisions of the Tax Court. Silverman v. Commissioner, 39 A.F.T.R. 2d 997 (Feb. 10, 1977). The Supreme Court denied taxpayers' petition for a writ of certiorari. Silverman v. Commissioner, 45 U.S. Law Week 3778 (May 31, 1977).

SUMMARY OF ARGUMENT

The sole question raised by taxpayers on this appeal is whether Section 407 of the Social Security Act exempts from a tax levy sums in taxpayers' bank accounts. The language of Section 407 broadly exempts social security benefit payments from creditors' claims. However, Section 6334(c) of the Internal Revenue Code of 1954, clearly and explicitly provides that "notwithstanding any other law of the United States, no property * * * shall be exempt from levy other than the property specifically made exempt by [Section 6334(a)]". The effect of Section 6334(c), insofar as federal tax levies are concerned, was to nullify all other exemption provisions and to make Section 6334 the sole authority with respect to limitation of the use by the Government of the levy procedure to collect federal taxes. As this Court has held, Section 407 of the Social Security Act was one of the exemptions which was rendered inapplicable to federal tax claims. Taxpayers' reliance upon Section 407 was properly rejected by the trial court and it accordingly was correct in dismissing this suit for failure to state a claim upon which relief may be granted.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT SUMS
DEPOSITED IN TAXPAYERS' BANK ACCOUNTS WERE NOT,
BY THE PROVISIONS OF SECTION 407 OF THE SOCIAL
SECURITY ACT, EXEMPTED FROM LEVY TO SATISFY
THEIR FEDERAL TAX LIABILITIES

The sole issue raised by taxpayers in the court below, as well as on this appeal, is whether, by virtue of the provisions

of Section 407 of the Social Security Act, sums which taxpayers alleged were the proceeds of social security benefit payments are exempt from a levy to satisfy their federal tax liabilities. Section 407 of the Social Security Act (42 U.S.C.), Appendix, infra, provides that:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

While the above provision might appear on its face to cover levies to satisfy federal tax liabilities, Section 6334(c) of the Internal Revenue Code of 1954, Appendix, infra, provides:

Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

Thus, the clear prescription of Section 6334(c) is that the exclusive exemptions from tax levies are those contained in Section 6334(a), Appendix, infra, United States v. Mitchell, 403 U.S. 190, 204-205 (1971); Sims v. United States, 359 U.S. 108, 111, fn. 5 (1959); 9 Mertens Law of Federal Income Taxation (Rev.) § 49.192, pp. 334-337. The legislative history of the section establishes that one of its purposes was to make clear that no other provision of federal law (including, therefore, Section 407) exempts property from levy to satisfy tax liabilities. H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A408-A409 (3 U.S.C. Cong. &

Adm. News 4017, 4556); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 577-578 (3 U.S.C. Cong. & Adm. News 4621, 5226-5227); see Fried v. New York Life Insurance Co., 241 F. 2d 504, 507 (C.A. 2, 1957), cert. denied, 354 U.S. 922 (1957). As this Court has held, the thrust of Section 6334(c) was to negate the effect of Section 407 of the Social Security Act insofar as tax levies are concerned. Kane v. Burlington Savings Bank, 320 F. 2d 545, 549 (1963), cert. denied, 375 U.S. 912 (1963).

In Philpott v. Essex County Welfare Board, 409 U.S. 413, 417 (1973), relied upon by taxpayers (Br. 5), the Supreme Court stated that the language of Section 407 "is broad enough to include all claimants, including a State". But that case did not involve a levy to satisfy federal tax liabilities (or, therefore, Section 6334(c)) but only whether the State of New Jersey could reach federal disability payments. The Court concluded (Id., pp. 416-417) that the claim of a state should not be distinguished from the claims of general creditors and that notwithstanding state statutes providing special remedies for collection of the state's claim, under the Supremacy Clause the disability payments were exempt from the state's claim.

It is apparent that the Supreme Court had no occasion in Philpott v. Essex County Welfare Board to discuss the impact of Section 6334(c). Nor did the Court cite or consider its

decisions in United States v. Mitchell, supra, or Sims v. United States, supra, which discuss the limitations on exemptions from tax levies. The special considerations and statutes governing federal tax levies were not in issue. Under the circumstances Philpott v. Essex County Welfare Board is not in point and taxpayers' reliance on the case is misplaced.

We note that, although clearly made aware of Section 6334(c) (see, e.g., Government's memorandum, R. 24-26, and taxpayer's comments, Tr. 5), the taxpayers, unlike the taxpayer in Kane v. Burlington Savings Bank, supra, neither here nor in the District Court, have asserted any basis under Section 6334(a) for exempting their bank accounts from the tax levy.^{4/} Therefore, the District Court properly dismissed this complaint for failure to state a claim upon which relief may be granted.

In any event, taxpayers' request (Br. 6) that this Court reverse the District Court's order dismissing the suit and vacate the levy on their bank accounts is without justification, since taxpayers have not yet established that the sums in their bank

^{4/} Section 6334(a) of the Internal Revenue Code has been amended subsequent to this Court's decision in Kane v. Burlington Savings Bank, supra, by the additions of subsection 5 (undelivered and unopened mail), subsection 7 (workmen's compensation), subsection 8 (amounts required by court judgment to be contributed to a minor's support), and subsection 9 (minimum salary exemption). Taxpayers assert no reliance upon any of the amendatory provisions.

accounts represented the proceeds of social security payments. Contrary to taxpayers' assertion (Br. 6) that Government counsel conceded the point at oral argument below, Government counsel asserted at oral argument (Tr. 10-11), as well as in memorandum (R. 27), that taxpayers had failed to establish that the sums in the bank accounts were the proceeds of social security payments. The District Court did not resolve this factual dispute, but rather dismissed the action for failure to state a claim upon which relief could be granted. See Kane v. Burlington Savings Bank, supra, pp. 546, 549-550. Thus, if this Court should conclude for any reason that the District Court improperly dismissed taxpayers' complaint, the case should be remanded for further proceedings including resolution of this issue.

CONCLUSION

For the foregoing reasons, the order of the District Court is correct and should be affirmed.

Respectfully submitted,

MYRON C. BAUM,
Acting Assistant Attorney General,

GILBERT E. ANDREWS,
WILLIAM A. FRIEDLANDER,
WYNETTE J. HEWETT,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

DAVID G. TRAGER,
United States Attorney.

RODGER C. FIELD,
Assistant United States Attorney.

JUNE, 1977.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on appellants, appearing pro se, by mailing four copies thereof on this 27th day of June, 1977, in an envelope, with postage prepaid, properly addressed to them as follows:

Frank L. Silverman, Esquire
Mrs. Anna Silverman
258 Broadway
New York, New York 10007

Gilbert E. Andrews
GILBERT E. ANDREWS,
Attorney.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) Enumeration.--There shall be exempt from levy--

(1) Wearing apparel and school books.--Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, provisions, furniture, and personal effects.--If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed \$500 in value;

(3) Books and tools of a trade, business or profession.--So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate \$250 in value.

(4) [as amended by Sec. 104(c)(1), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] Unemployment benefits.--Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) [as added by Sec. 812(a), Excise Tax Reduction Act of 1965, P.L. 89-44, 79 Stat. 136] Undelivered mail.--Mail, addressed to any person, which has not been delivered to the addressee.

(6) [as added by Sec. 104(c)(2), Federal Tax Lien Act of 1966, supra] Certain annuity and pension payments.--Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) [as added by Sec. 104(c)(2), Federal Tax Lien Act of 1966, supra] Workmen's compensation.-- Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) [as added by Sec. 945(a), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] Judgments for support of minor children.-- If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary wages, or other income as is necessary to comply with such judgment.

(9) [as added by Sec. 1209(a), Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520] Minimum Exemption for Wages, Salary and Other Income.-- Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

* * *

(c) No Other Property Exempt.--Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

(d) [as added by Sec. 1209(b), Tax Reform Act of 1976, supra] Exempt Amount of Wages, Salary, or Other Income.--

(1) Individuals on weekly basis.--In the case of an individual who is paid or receives all of his wages, salary, and other income on a weekly basis, the amount of the wages, salary, and other income payable to or received by him during any week which is exempt from levy under subsection (a)(9) shall be--

- (A) \$50 plus
- (B) \$15 for each individual who is specified in a written statement which is submitted to the person on whom notice of levy is served and which is verified in such manner as the Secretary shall prescribe by regulations and--

(1) over half of whose support for the payroll period was received from the taxpayer,

(ii) who is the spouse of the taxpayer, or who bears a relationship to the taxpayer specified in paragraphs (1) through (9) of section 152(a) (relating to definition of dependents), and

(iii) who is not a minor child of the taxpayer with respect to whom amounts are exempt from levy under subsection (a)(8) for the payroll period.

(2) Individuals on basis other than weekly.--

In the case of any individual not described in paragraph (1), the amount of the wages, salary, and other income payable to or received by him during any applicable pay period or other fiscal period (as determined under regulations prescribed by the Secretary) which is exempt from levy under subsection (a)(9) shall be an amount (determined under such regulations) which as nearly as possible will result in the same total exemption from levy for such individual over a period of time as he would have under paragraph (1) if (during such period of time) he were paid or received such wages, salary, and other income on a regular weekly basis.

Social Security Act, c. 531, 49 Stat. 620:

Sec. 207 [as amended by Sec. 201, Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. Assignment.

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(42 U.S.C. §407.)